82-2097

No.

LUIGI MARRE LAND AND CATTLE COMPANY,
Petitioner

v.

PACIFIC GAS AND ELECTRIC COMPANY,
and JOHN F. READY, Trustee in Bankruptcy,
Respondents

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX OF APPENDICES

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re DIABLO CANYON CORPORATION, a California corporation, Bankrupt.	)	Nos. 82-5223/5224 D.C. Nos. CV 80-3125/3124 MEMORANDUM
In re SAN LUIS OBISPO BAY PROPERTIES INC., a California corporation, Bankrupt.	)	
JOHN F. READY, Trustee, Plaintiff-Appellee, PACIFIC GAS AND ELECTRIC COMPANY, a California corporation, Intervenor-Appellee, v. LUIGI MARRE LAND AND CATTLE COMPANY, a California corporation, Defendant-Appellant.	)	

Appeal from the United States District Court
for the Central District of California
Lawrence T. Lydick, District Judge, Presiding
Argued and submitted November 5, 1982

Before: SCHROEDER and ALARCON,* Circuit Judges.

This is an appeal from a bankruptcy court judgment, affirmed by the district court, holding

*Honorable Roger Robb, Senior United States Circuit Judge, District of Columbia Circuit, participated in the argument but not in the disposition.

that leases between appellant Luigi Marre Land and Cattle Company (Cattle Company) and two related bankrupt corporations were in full force and effect. The result of the judgment is to render effective a settlement negotiated between the Trustee and Pacific Gas & Electric (PG&E), the current subtenant, under which the Trustee agreed to assign to PG&E the bankrupts' interest under the leases in exchange for a partial release of PG&E's claims against them.

The judgment must be affirmed. The bankruptcy court did not fail to "do equity" in approving the assignment of the leases. The fairness of the settlement under which the assignment was made was decided in prior proceedings and is not properly in issue here. The court did not abuse its discretion either in refusing to permit Cattle Company to take discovery of PG&E after PG&E intervened or in admitting into evidence transcripts of testimony by Robert Marre in a related state court proceeding. Fed. R. Evid. 801(d)(2)(D). The court's conclusion that the leases were not abandoned by the Trustee or terminated prior

to the assignment was not clearly erroneous. The appellant's contention that it is entitled to a right of redemption under section 2903 of the California Civil Code is not properly before us because it was never raised in the bankruptcy court. In bankruptcy, as in other proceedings, an appellate court will not review an issue not presented below, unless necessary to prevent injustice. In re Southland Supply, Inc., 657 F.2d 1076, 1079 (9th Cir. 1981). Moreover, the contention is not supported by any California authority.

Affirmed.

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re SAN LUIS OBISPO BAY PROPERTIES, INC., a California corporation, Bankrupt.	BK NOS. 74-05260-CA "B" 74-05261-CA "A"
JOHN F. READY, Trustee, Plaintiff, vs. LUIGI MARRE LAND AND CATTLE COMPANY, a California corporation, Defendant.	
In re DIABLO CANYON CORPORATION, Bankrupt.	MEMORANDUM OF DECISION (Complaints to Determine Validity and Status of Leases)
JOHN F. READY, Trustee, Plaintiff, vs. LUIGI MARRE LAND AND CATTLE COMPANY, a California corporation, Defendant.	

APPENDIX "B"

The trial on the complaints to determine validity and status of leases in each of these adversary proceedings commenced in Los Angeles, California before the undersigned on March 24, 1980 and concluded on April 18, 1980. The two adversary proceedings were consolidated at the time of trial.

David Y. Farmer of FARMER & MINTZ appeared for the plaintiff JOHN F. READY. David J. McCarty of SHEPPARD, MULLIN, RICHTER and HAMPTON appeared for the intervenor PACIFIC GAS & ELECTRIC COMPANY; MERRILL R. FRANCIS of the firm and ARTHUR L. HILLMAN, JR. of PACIFIC GAS & ELECTRIC COMPANY also appeared. Raymond Wallenstein appeared for the defendant LUIGI MARRE' LAND AND CATTLE COMPANY. Jerome M. Jackson of GLASSMAN AND BROWNING, INC. was the attorney for defendant Kenneth E. Palm. He joined in the joint pretrial order but did not appear at trial.

The purpose of the adversary proceedings is to determine the validity and current status of two long-term leases of land in San Luis Obispo County, California on which LUIGI MARRE'

LAND AND CATTLE COMPANY (Cattle Company) was the lessor. SAN LUIS OBISPO BAY PROPERTIES (Properties) was the lessee on one lease. DIABLO CANYON CORPORATION (Diablo) was the lessee on the other. In an order filed October 18, 1977, the Bankruptcy Court approved a settlement between the trustee and Pacific Gas & Electric Company (PG&E) which contemplated that the leasehold estate under the Properties Lease and a portion of the leasehold estate under the Diablo Lease would be assigned by the trustee to PG&E. The further purpose of these adversary proceedings is to determine whether the assignments can be made and what rent, if any, is due under the Properties and Diablo Leases.

UNDISPUTED FACTS

Diablo Canyon Corporation (Diablo), San Luis Obispo Bay Properties, Inc. (Properties), San Miguelito Park Co. (Park), and San Luis Bay Club (Club), filed original petitions under Chapter XI on April 30, 1974. John F. Ready was appointed the Receiver of each corporation on the same date. Each corporation was adjudicated a bankrupt on February 28, 1977 and John

F. Ready became the trustee for each corporation on that date. He was appointed standby trustee on June 19, 1974.

Louis J. Marre' was the president and Tressa B. Marre' was the secretary of the defendant Cattle Company on September 17, 1966. They held these offices until the death of Louis J. Marre' on September 1, 1971 at which time Tressa B. Marre' became president. She held this position continuously until her death on June 25, 1976. Robert B. Marre' was the president of Properties and Park on September 17, 1966 and has held such position continuously until the present. During the same period he was also president of Club. On December 26, 1968, he was president of Diablo.

On September 17, 1966, Cattle Company as lessor and Properties as lessee executed a lease of parcels P, T, R and L (Properties Lease). Concurrently with the execution of the Properties lease on September 17, 1966, Properties as sub-lessor and PG&E as sublessee, executed a sublease (PG&E Sublease) of parcels P, T, and R. only. Also concurrently with the execution of the

Properties lease and the PG&E sublease Properties, Cattle Company, and PG&E executed a letter of agreement dated September 17, 1966. The Properties Lease and PG&E Sublease were 99 year leases with options to renew for 99 years. In lieu of payment of rent on the PG&E Sublease, PG&E agreed to guarantee debts of Properties for a period of years in amounts subject to periodic adjustments to a limit of $20 million. As an offset to this contingent liability on its balance sheet, PG&E took as security a lien upon the interest of Properties in parcels P, T, R and L. The arrangement was approved by the California Public Utilities Commission. The Properties Lease has not been terminated. The trustee in bankruptcy for Properties did not assume the PG&E sublease. (A map of the property is attached as Exh. A).

The letter agreement provided that the description of parcel L would be amended after Properties, Cattle Company, and PG&E agreed upon revised physical boundaries and that the description of parcel R would be amended after Properties and PG&E agreed upon the location

of a road. These descriptions were agreed upon.

The purpose of the PG&E sublease was for PG&E to construct a nuclear power plan upon parcel P. The plant is being constructed although it is not yet licensed. The cost was estimated at one and one half billion dollars. Parcel T was land over which there was an easement for transmission lines. Parcel R was for construction of a road over Parcel L. Parcel L was coastal land zoned for residential development.

On December 26, 1968, Cattle Company as lessor and Diablo as lessee executed a lease (Diablo Lease) whereby Cattle Company leased the Diablo parcel to Diablo for 99 years with an option to renew for another 99 years. A memorandum of the Diablo lease was recorded February 6, 1969 in Volume 1506 at page 321, official records, County of San Luis Obispo, State of California. On September 14, 1973, and again on March 15, 1974, the Diablo lease was amended to state rents separately for portions of the leased premises (lots X and W, respectively).

Cattle Company contends that the Diablo Lease has been terminated.

On April 30, 1974 and on February 28, 1977 (1) PG&E was in possession of parcel P, (2) PG&E as well as the trustee, Cattle Company, and others, was utilizing the right-of-way and easement under the Properties sublease over the road built on parcel R as revised, and (3) PG&E had constructed transmission lines and related appurtenances over the easement under the Properties Lease described therein as parcel T.

The trustee in bankruptcy of Diablo and Park did not obtain orders of the Bankruptcy Court authorizing him to assume any executory contract or lease between Diablo and Park. There was a grazing Lease between Properties and Park which the trustee for Properties and Park did not assume.

Cattle Company has never given Diablo or the trustee formal written notice of any default in the payment of rent under the Diablo lease. All activities on the property covered by the Diablo lease have been agricultural. The total

area covered by the Diablo lease is not less than 5,020 acres.

Cattle Company has never given Properties, the trustee in bankruptcy of Properties, or PG&E formal written notice of any default in the payment of rent under the Properties Lease.

THE ORDER OF OCTOBER 17, 1977

On December 30, 1971, PG&E sued Properties, Diablo, Park, and Club, as well as Cattle Company and individual members of the Marre' family and others in the San Luis Obispo County Superior Court. It had been required to make substantial payments under its guarantee. The suit also sought foreclosure of PG&E's lien upon parcels P, T, R, and L. In April 1974, a motion for the appointment of a receiver was made in that case and was set for hearing on May 1, 1974. The four bankruptcy cases were filed on April 30, 1974 on which date the then Chapter XI debtors obtained temporary restraining orders to stay the State Court actions. PG&E filed motions to dismiss the restraining orders. the motions were denied. The order of the District Court affirming the Bankruptcy Judge was appealed on

June 17, 1975 to the 9th Circuit Court of Appeals. On February 25, 1975, the Bankruptcy Court entered an order staying proceedings pending appeal. Time elapsed and the debtor corporations were adjudicated bankrupts.

The trustee of Properties compromised a claim with J. F. Sanson for the sum of $380,600.00 payable $50,000 upon confirmation and the balance over a period of five years. The trustee also proposed to compromise with James Talcott, Inc. by permitting Talcott to foreclose on security held by Talcott in consideration of Talcott assigning to the trustee of Park a note secured by a deed of trust on land known as the Tognazzini parcel. The note had an approximate balance of $342,000. PG&E had filed proofs of claim in the bankrupt estates in the amount of $13,374,498.76. It claimed an ownership in the proceeds of the Sanson settlement and claimed an ownership in the property covered by the Talcott security superior to that of Talcott.

The order of October 18, 1977 approved a stipulation between the trustee in bankruptcy of the four bankrupt corporations and PG&E.

PG&E agreed to release claims against the following assets: proceeds of the Sanson settlement; the note and deed of trust assigned to the trustee of Park arising out of the Talcott settlement; the interest of the bankrupt estates in various parcels including the Tognazzini parcel; the interest of the bankrupt estates in the leasehold estate created by the Diablo Lease when and if the trustee were to assign to PG&E and PG&E were to accept a certain portion of the Diablo Lease; and, all personal property located on the various parcels. It reduced the claims of PG&E and provided for payment of dividends in a certain way. The trustee gave PG&E the right to go into possession of parcel L, subject only to an annual grazing lease and crop lease in favor of Frank Mello, and an annual lease in favor of Ken Palm or Palm Brothers or both (Palm) which leases would expire on April 30, 1978. After PG&E took possession, it would be entitled to any rental accruing. The trustee released PG&E and others from all other claims. The trustee was to assign his interest in a portion of the Diablo Lease located west of

Pecho Creek (generally bounded by Parcel L on the south side, Parcels P and T on the west, Pecho Creek on the east, and the northerly boundary of the Marre' Ranch on the north). PG&E assumed the pro rata rental payments, thereafter becoming due. The trustee assigned his interests in the Properties Lease to PG&E other than the leasehold covering lot W, with an option in PG&E to have Lot W assigned within one year after acceptance of the assignment of the Properties Lease by PG&E. Neither assignment has yet been consummated.

The stay in the state court was modified as to PG&E in such a way as the proceeding would not affect these bankrupt estates. PG&E dismissed its appeal in the 9th Circuit.

Cattle Company appeared prior to October 18, 1979 and objected to the settlement based upon fairness to creditors. The Order of October 18, 1977 was appealed by Western Gillette, Inc., a creditor. The District Court affirmed the order. The 9th Circuit Court of Appeals dismissed the appeal. The order is final.

CATTLE COMPANY'S THEORY OF THE CASE

The Properties Lease has never been terminated but it was not properly assumed and therefore abandoned by the trustee. This, in effect, makes Properties the owner of the Properties Lease. As owner, it would be entitled to the benefits of the Lease, including the guarantees by PG&E. Diablo Corporation abandoned and surrendered the Diablo Lease before April 30, 1974. Therefore, the Diablo Lease is not in effect.

It is alleged that after April 30, 1974, the receiver and trustee failed to take possession of the premises demised under the Properties Lease, to pay rent, or to enforce the rental obligations of PG&E under the PG&E sublease. This is alleged to be an abandonment and rejection of the Properties Lease. If it is determined that the trustee did not abandon and reject the Properties Lease by inactivity, then it is contended that he did not assume or reject the Lease pursuant to §70b of the Bankruptcy Act and Bankruptcy Rule 607. If it is determined that the trustee abandoned or rejected the Properties Lease, then

it is contended that the leasehold remains vested in the bankrupt (Rroperties). It would follow that the sublease between Properties and PG&E is in full force and effect. Consequently, Properties would be entitled as rental to have debts guaranteed by PG&E.

It is further contended that the trustee cannot assign the Properties Lease to PG&E without first obtaining approval of the assignment by the court after notice to Cattle Company and a hearing. It is further contended that the Lease cannot be assigned to PG&E over the objection of Cattle Company and in view of the Lease provisions.

ISSUES

Despite the volume of pleadings and the length of trial, the issues in these adversary proceedings are easy to state.

1. The validity and current status of the Properties Lease of parcels P, T, R, and L between Cattle Company as lessor and Properties as lessee.

a. Has the lease been amended, modified, or terminated in any way?

b. Did the trustee properly assume the Properties Lease?

c. Does the Cattle Company have the right to terminate the Properties lease?

d. May the Properties leasehold be assigned to PG&E as contemplated in the settlement between the trustee and PG&E in the order of October 18, 1977?

2. The validity and current status of the Diablo lease between Cattle Company as lessor and Diablo as lessee.

a. Has the Diablo lease been amended, modified, or terminated in any way?

b. Did the trustee properly assume the Diablo lease?

c. Does Cattle Company have the right to terminate the Diablo lease?

d. May the PG&E portion of the Diablo leasehold be assigned to PG&E as contemplated in the settlement between the trustee and PG&E in the order of October 18, 1977?

3. The amount of rent, if any, due under the Properties lease and the Diablo lease.

4. Does the Bankruptcy Court have jurisdiction?

5. Is the Cattle Company estopped or otherwise precluded from litigating any of these issues?

ACTIVITIES OF THE RECEIVER AND TRUSTEE

John F. Ready as receiver took possession of all assets of Properties and Diablo, including the leaseholds demised under the Properties and Diablo leases. At the time he took possession, he found agricultural and grazing subtenants on parcel L. Frank Mello was engaged in crop production and Palm was engaged in cattle grazing. Palm also grazed cattle on the Diablo parcel.

The trustee had conversations with the subtenants concerning the payment of subrents on Parcel L and the Diablo parcel. He was told that the rentals were being paid directly to Robert M. Marre'. He requested that the payments be made to the receiver. Thereafter, he did not receive any payments from either Mello or Palm.

When the receiver asked Marre' for the amount of the payments that had been made since April 30, 1974, Marre' never indicated to Ready that the estates were not entitled to a credit for the subrents.

Ready wrote to Mello requesting information on subrents that had been paid and he received a reply. On March 9, 1978, David Y. Farmer, the attorney for the trustee, wrote to Robert B. Marre' requesting an accounting of all rents received for the period subsequent to April 30, 1974. At that time, he told Marre' in the letter that the leases had been assumed. No response was received to this letter.

The trustee obtained appropriate extensions of time for the assumption or rejection of the leases as executory contracts. After the order of October 18, 1977, and during the time of the extensions granted by the Bankruptcy Court, the trustee filed an application with the court to assume the Properties lease and obtained an order approving the application. He also filed an application for an order authorizing the trustee

to assume the Diablo lease and obtained an order approving that application.

On March 2, 1978, the turstee gave to Cattle Company and its attorney separate notices of assumption of the Properties lease and the Diablo lease pursuant to Bankruptcy Act 70b and Rule 607 of the Federal Rules of Bankruptcy Procedure. The notice of assumption of the Properties lease incorporated by reference a copy of the Properties lease dated September 17, 1966, the amendment to the Properties lease dated March 15, 1974, which separately stated rent on a portion of the premises demised known as Lot W, the amended description of Parcel L, and the amended description of Parcel R. The notice of assumption of the Diablo lease incorporated by reference the Diablo lease dated December 26, 1968, the amendment to the Diablo lease dated September 14, 1973, which stated rent separately for a portion of the demised premises known as Lot X, and the amendment to the Diablo lease dated March 15, 1974, which stated rent separately for a portion of the demised premises known as Lot W.

As of April 30, 1974, real property taxes for the years 1970, 1971, 1972, and 1973 on the Properties and Diablo parcels had not been paid. These taxes were paid by the trustee and PG&E in order to prevent the property from being sold to the state. Only these entities paid the taxes, Cattle Company did not. The taxes for the years prior to 1970 had been paid by Diablo, either by check drawn by Diablo or out of the settlement of a loan transaction with James Talcott, Inc. on July 28, 1972 and September 24, 1973.

Certain actions were taken as a result of the settlement order of October 18, 1977. PG&E released a lis pendens which it had recorded in the related State Court action. Talcott was permitted to foreclose on its security interest. Prior to the settlement, Diablo was the owner of the Tognazzini parcel consisting of 20 acres. Diablo had given a promissory note and deed of trust to Talcott. As part of the settlement with Talcott, Talcott assigned the promissory note and deed of trust to Ready as trustee for Park. The trustee then sold the Tognazzini parcel to Port San Luis Harbor District for

$500,000. Some of these funds went to the estate of Diablo. $350,000 went to the estate of Park of which a significant portion was used to pay taxes on the leasehold estates. The balance of the $500,000 was used to satisfy a second deed of trust held by Imperial Savings and Loan. As part of the settlement authorized by the order of October 18, 1977, the trustee compromised a controversy with the Joseph F. Sanson Investment Company (Sanson). Properties had a partnership arrangement with Sanson which invested in real property in Las Vegas. Since it was difficult to get the assets which belonged to the bankruptcy estate out of the partnership, it was agreed that Sanson would give the trustee a $380,600 promissory note and that the trustee would assign to Sanson claims of the bankruptcy estate against San Ricardo Land and Cattle Co. (a corporate subsidiary of Properties). The note was payable over a five year period and is being paid. PG&E had asserted lien claims and claims of constructive trust against the Sanson proceeds. These claims were withdrawn

by PG&E as were claims PG&E had against the property in which Talcott claimed a security interest.

The trustee withdrew cross-complaints filed by the bankrupts in the related state court action and permitted the state court action to proceed under certain conditions.

CLOSE CONNECTION

The trustee and PG&E contend that Cattle Company should be prevented from terminating the Diablo and Properties Leases and that the assignment of the Properties Lease and the PG&E portion of the Diablo Lease to PG&E should be permitted. They also contend that because of the close connection among the Marre' family as individuals, Cattle Company, the four bankrupt corporations, and related other entities, equities which would prevent termination and favor assignment run in favor of the creditors of the bankrupt estates. Cattle Company should therefore be prevented from litigating the issues as to termination and assignment.

Certain exhibits introduced in the state court case were introduced in this adversary

proceeding as a series (exhibit 33); portions of the transcripts of the state court proceeding were introduced as a series (exhibit 55). The testimony in the state court was that of Robert B. Marre', the principal of an adverse party in these adversary proceedings. Use of the transcript was permitted in the manner that a deposition of an adverse party is permitted under F.R.C.P. 32(a)(2). Both the state court exhibits and testimony are relevant to show the closeness of connection among the various Marre' entities and individuals. Their use might not be necessary because of the testimony of Robert F. Marre' himself in this trial. Their use was cumulative only.

The closeness of connection has sometimes been referred to as alter ego but it is not alter ego in the sense of giving rise to a cause of action for personal liability for the debts of a corporation for which the concept is considered in this case. Instead, it is used in its latin sense of other self or, stated otherwise, to show the close connection among the various entities and individuals. In addition

to the relevancy to the issue of whether equity should allow Cattle Company to terminate the leases, it is also relevant to the issue of whether payment of the rent to Cattle Company should be subordinated or denied as an insider claim. Otherwise, the trustee in bankruptcy may not invoke the alter ego doctrine on behalf of creditors. The issue of whether a particular complaining creditor must prove damage so as to justify holding the alter ego liable does not arise in this case. See Stodd v. Goldberger, 73 Cal.App.3d 827 (1977).

From the evidence, it appears that Robert B. Marre' is not only the alter ego of Cattle Company and the bankrupt corporations, but also that Cattle Company and the bankrupt corporations were the alter egos of each other. The Marre' family corporations had essentially the same officers and directors. Shares were owned by the family. The corporations were operated out of the same offices and held meetings at the Marre' Ranch. They used the same employees, attorney, and accountant. They guaranteed debts

among each other. Funds were expended by one corporation for the benefit of another. The corporations were grossly under capitalized. Poor records were maintained. Corporate formalities were not followed. They were operated for the convenience of the individual Marre' family members.

The land constituting the Marre'Ranch had been owned by Luigi Marre' Land & Cattle Co. since 1914. It consisted of about 8,700 acres until about 1966 at which time about 1,040 acres were sold to Park. The principal activity of Cattle Company was to manage a piece of property. The property had been acquired by the grandfather of Robert B. Marre' who died in 1903. By 1949 or 1950, his mother and father owned all the shares of the Cattle Company. Some time in the 1940's, the mother and father (Louis and Tressa Marre') began giving shares of stock in the corporation to Robert B. Marre' and his sister. By 1954, the sister owned 11% and Robert B. Marre' and his wife owned 11%.

In the 1940's and 1950's, a general estate plan was formulated by Louis and Tressa Marre'

for the purpose of passing on assets and avoiding estate taxes. The separate existence of the various corporations that were formed for tax and estate planning purposes was, for the most part, disregarded. Properties itself was intended to be used to operate as a "bank" for the other Marre' entities and the Marre' families. Properties, in fact, did this. It made loans to other Marre' interests at exactly the same rate at which it was borrowing money using the PG&E guarantee. The loaNs were made with no expectation of profits, yet it entered into other credit transactions for its own account. Documentation of the loans was either not in existence or it came into existence after the transaction.

Robert B. Marre' testified that he had set up a trust account in which he co-mingled the assets of the various entities. From the account, he paid the bills of the various entities, including Properties, Diablo, and Cattle Company. He often converted checks received on behaLf of an entity to a cashier's check for the benefit of Cattle Company. He would hold on to the cashier's

checks and use them for the benefit of those who needed it, including his sister, related organizations and himself. The funds were his only means of survival. He considered them to be loans from Cattle Company but there was no promissory note signed by him. There was no authorization from the board of directors of Cattle Company to enter into the loans.

There were various transactions between Cattle Company and Marre' family entities, or members, which took place without adequate consideration.

The closeness of connection, alter ego, or convenience of connection are further illustrated by the oral lease transactions between Diablo and Park Company and the termination of these leases.

ORAL LEASES AND CANCELLATIONS

The testimony as to oral leases and cancellations was by Robert B. Marre'. Stripped of confusion, Park had a grazing lease on a portion of the property covered by the Properties Lease, first with Cattle Company then, after the Properties Lease came into existence, with

Properties. At the time the Diablo Lease came into effect, there was an oral lease between Park and Diablo similar to the oral lease in existence between Park and Properties. Park then entered into leases with agricultural and grazing subtenants.

Park was to pay to Diablo and Properties basically the same money received as subrents by Park. The question of how much Park was to pay to Properties and how much was to be paid to Diablo was never faced. After all, cattle grazed at will over the contiguous parcels. Park Company retained no money for management services.

In January 1974, when the Diablo and Properties Leases were both in effect, there were oral grazing leases in effect among Diablo, Properties, and Park. These were cancelled to be effective with the grazing year to commence in July, the reason being that rental had not been paid by Properties and Diablo to Cattle Company. At this time, Robert B. Marre' agreed that the money received from the agricultural and grazing subtenants would be paid directly to

Cattle Company. At the convenience of the Marre' family, the leases between Properties and Park and Diablo and Park were cancelled and also the lease between Cattle Company and Diablo was cancelled. No consideration was given for the cancellation of the leases, even though the Diablo Lease was valued in the millions of dollars. Robert B. Marre' represented both Diablo and Park Company in the creation of the lease and the cancellation of the lease. His mother represented Cattle Company.

Robert B. Marre' testified that the reason there was no formal as distinguished from oral cancellation of the Diablo Lease was because his mother thought it might be rejuvenated later.

Closely related to the discussion of close connection and oral leases is the following discussion of Inconsistent Facts and Inconsistent Prior Testimony.

INCONSISTENT FACTS AND PRIOR INCONSISTENT TESTIMONY

Inconsistent with the creation of the agricultural and grazing subleases, their cancellation, and the cancellation of the Diablo Lease,

are certain testimony and events that took place prior to the trial.

In February 1974, Diablo agreed to assign an undivided one-half interest in the Diablo Leasehold to Frank C. Campbell. Campbell was not told that the Diablo Lease had been terminated. In connection with the foregoing, Campbell made advances and was given as security an assignment of all rents, issues and profits and a portion of the leasehold known as Lot W. Lot W was partly in Parcel L (Properties) and partly in the Diablo Parcel. Again, Campbell was not told that the Diablo Lease had already been terminated. The lease was treated as being in effect.

On October 30, 1979, Robert B. Marre' executed an affidavit in support of Cattle Company's objection to an application for a temporary restraining order in these adversary proceedings which he stated that in February 1974, when he was president of Diablo, Diablo owed Cattle Company in excess of $49,000 in unpaid rental. On or about February 25, 1974

Diablo, Properties, Park and Cattle Companies orally agreed that Park's oral grazing and agricultural leases with Diablo and Properties would end at the close of the 1974 pasture year, at which time the Diablo Lease would terminate. That oral agreement took place between Robert B. Marre' and himself. (It is more probable that the agreement did not take place at all.) The affidavit also stated that in February 1974 when he was president of Properties, Properties surrendered to Cattle Company all agricultural, grazing and possessory rights and the premises demised under the Properties Lease.

The schedules and statements of affairs of Properties and Diablo set forth that the Properties and Diablo Leases are assets of the estate. The statements of executory contracts similarly so state. The January 1974 agreement to terminate the agricultural and grazing rights leases, effective July 1974, are not set forth in the statement of executory contracts.

On June 19, 1974, at a first meeting of creditors in Santa Barbara, California, Marre'

testified that the Properties and Diablo Leases were valuable assets of the estates. Properties would pay creditors by selling its leasehold interest in Parcel L. One such agreement was with Transatlantic Holdings which stated that the Diablo and Property Leases were in good standing and that no default existed under the leases.

On April 30, 1974, petitions were filed to restrain PG&E from continuing with the state court action. They were signed by Robert B. Marre'. In the Diablo case, the petition stated that Diablo owned the leasehold interest in the Diablo Parcel which had a reasonable fair market value of $10,140,000.

On March 28, 1978, Cattle Company wrote the County Assessor of San Luis Obispo County. It said that the receiver of the assets of Properties and Diablo had asked for, and the Bankruptcy Court had approved, the maintaining of leases among Properties and Diablo and the owner of the fee, namely Cattle Company. It further defined that portion of the Properties

Leasehold on which the receiver was to pay taxes and that portion on which PG&E was to pay taxes. This despite the alleged transfer back to Cattle Company of the agricultural and grazing rights.

At a continued first meeting of creditors on May 11, 1978, Marre' testified that the Diablo lease had not been modified, terminated or amended in any other wasy than by written agreement which had been provided to the trustee. He said the lease was in full force. Whatever writings existed terminating the lease would be in the possession of the trustee. When asked, at that time, if the trustee owed Cattle Company rent under the Diablo Lease, he answered yes and that he was in the process of obtaining an accounting.

ASSUMPTION

Bankruptcy Act §70b provides that the trustee shall assume or reject an executory contract, including an unexpired lease of real property, within 60 days after adjudication or within 30 days after his qualification. Bankruptcy Rule 607 modifies the time for assumption

or rejection to 60 days after qualification of the trustee. Both 70b and Rule 607 provides for extension of time within which to assume or reject.

Rejection in a Chapter XI was permitted either as part of a plan or by permission of the court prior to confirmation of a plan. In either event, rejection in a Chapter XI required affirmative conduct. Bankruptcy Act §70b and Rule 607 were inconsistent with Chapter XI and did not apply.

In these cases, no plan was confirmed. Consequently, the leases were not required to be assumed or rejected during the Chapter XI proceedings. On April 25, 1977, within 60 days after the date of adjudication on February 28, 1977, the trustee obtained one of a series of successive orders extending the time to assume or reject the leases and executory contracts. Each extension was obtained prior to the expiration of the previous extension. The assumption of the Properties and Diablo leases was accomplished prior to the expiration of the last extension.

Bankruptcy Rule 607 does not require that notice of the application to assume or reject be given to creditors or to the other party to the contract. No such notice is required by Bankruptcy Rule 203 which collects the provisions for notices specifically applicable to creditors in bankruptcy cases.

As to notice to the other party to the contract, naturally that party would attempt to persuade the court that the contract should not be assumed. He would thereby try to avoid being held to a bad bargain. In view of this and the lack of such requirement, either in Rule 607 or Rule 203, notice of an application by the trustee to assume an executory contract is not required to be given to the other party to the contract. 13 Collier on Bankruptcy, ¶606.07[4], at pg. 6-94 (14th Ed. 1977).

TERMINATION

The Properties and Diablo leases provide that if rent is not paid on the exact due date, no default shall be declared until 30 days after written demand from the lessor. The insolvency

clauses in the leases provided that the appointment of a receiver or action taken under any insolvency or bankruptcy law would constitute grounds for termination of the lease unless the rentals were paid pursuant to the lease. Cattle Company never sought to terminate the leases because of insolvency, the appointment of a receiver, adjudication in bankruptcy, or default in rent. Furthermore, Cattle Company has not sought to terminate the Properties lease for any other reason. The only written notice that was given was on January 8, 1980, a letter obviously written in connection with posturing for this litigation. Marre' had previously testified that the Diablo lease was not "formally" cancelled because his mother thought it might be rejuvenated later.

Rentals under the leases were delinquent prior to the filing of the Chapter XI cases. Subsequent to the filing, the receiver and trustee paid rent to Cattle Company by allowing subtenants on the properties to pay their subrents directly to Cattle Company with the understanding that

the payments would be deemed to have been made through the trustee and concurrently paid over by the trustee to the Cattle Company. The trustee and PG&E paid taxes on the properties not because this was the responsibility of the lessee but in order to avoid the properties from being lost to the state.

It would be inequitable to permit Cattle Company to take advantage of any rent defaults, even if a default in rent occurred. The principals of the Cattle Company were the principals of Properties and Diablo. To permit a termination would be to benefit Cattle Company and the individual members of the Marre' family to the detriment of the creditors of Properties and Diablo.

Under §70b of the Bankruptcy Act, express bankruptcy clauses are enforceable unless there is a waiver by the landlord or when overriding equitable considerations dictate otherwise. The right to terminate may be waived or the landlord may be estopped from asserting the right to terminate. Davidson v. Shivitz, 354 F.2d 946 (2nd Cir. 1966), 4A Collier ¶70.44, B.J.M. Realty

Corp. v. Ruggieri, 338 F.2d 653 (2nd Cir. 1964). In Queens Boulevard Wine & Liquor Corp. v. Blum, 503 F.2d 202 (2nd Cir. 1974), the broad principal was set forth that a landlord by conduct evidencing an intent to affirm the lease, may waive the right to terminate or be estopped from asserting it. In these cases, the landlord not only accepted rentals in the manner previously described, but the principals of the landlord have, during the course of the bankruptcy cases, stated that the leases were in effect. Moreover, the law does not favor forfeitures. California Civil Code §3275, Gattien v. Coleman, 86 Cal.App.2d 266 (1948), and see In re Burke, 76 F.Supp. (S.D. Cal. 1948).

ASSIGNMENT

The Properties and Diablo leases permit assignment of the lessee's interest as to all or any portions of the premises demised, without the approval of the lessor, conditioned upon the lessee remaining liable for the performance of all the obligations of the lessee under the lease. This provision is rendered unenforceable by Bankruptcy Act §70b.

"A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; . . . A trustee who elects to assume a contract or lease of the bankrupt and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease, assigns the contract or lease to a third person, is not liable for breaches occurring after the assignment." Bankruptcy Act 70b.

The language contained in the Properties and Diablo leases is more restrictive. However, the leaseholds may be assigned to PG&E. PG&E would assume the rent under the leases for a portion of the rent based upon the portion of the leasehold assigned. The trustee would be relieved from any liability for any breach in

the payment of rent or any other obligations under the leases which would occur after the assignments.

ESTOPPEL AND RES JUDICATA

Cattle Company, its attorney, and Robert B. Marre' appeared at several of the hearings held in connection with the settlement between the trustee and PG&E which led to the order of October 18, 1977. Cattle Company submitted a written opposition to the settlement on the ground that it was not fair to creditors. Cattle Company did not raise the objection that the Properties Lease and the Diablo Lease were not assumable or assignable or that they could be terminated or had been terminated. By its silcence, Cattle Company acquiesced in the facts upon which the settlement was based. The settlement was not only approved, but in large measure consummated. The issues which Cattle Company seeks to raise in these adversary proceedings could have been raised at the hearings on the settlement.

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JURISDICTION

The Properties and Diablo leaseholds were in the actual or constructive possession of Properties and Diablo, respectively, on the date the Chapter XI cases were filed. Continuously thereafter they remained in the actual or constructive possession of the plaintiff John F. Ready, first in his capacity as receiver, and later as trustee.

The schedules and statements of affair filed by Properties and Diablo at the commencement of the Chapter XI cases show the Properties lease and the Diablo's lease as being leaseholds which were properties of the estate. Upon the filing, the leaseholds were in the possession of the receiver. The schedules and statements of affairs were verified under oath by Robert B. Marre', the president of each corporation. After the commencement of these adversary proceedings, the Marre' interests through Robert Marre' asserted a contrary position. The leases were also listed as executory contracts in the statement of executory contracts filed on April 30, 1974, and signed by Robert B. Marre', the president

of each corporation. At meetings of creditors in the Bankruptcy Court on June 19, 1974, and April 11, 1978, the continued existence of both leases was acknowledged under oath by Robert B. Marre'. At least until after the meeting of creditors on April 11, 1978, both Properties and Cattle Company, consistently took the position that both leases were in full force and effect.

On October 30, 1979, Cattle Company filed affidavits of Robert B. Marre' in these adversary proceedings. These affidavits have already been discussed under Inconsistent Facts and Prior Inconsistent Testimony. The positions taken by Cattle Company, Properties, and Diablo through Robert B. Marre', through and including April 11, 1978, are more credible than those taken in the affidavits on October 30, 1979 and as shown in the testimony of Robert B. Marre' during the trial of these adversary proceedings.

Cattle Company filed proofs of claim in the Properties and Diablo bankruptcies for rent due under the respective leases through April 30, 1974. No objection was made to the jurisdiction of the Bankruptcy Court.

There is summary jurisdiction in the Bankruptcy Court to adjudicate controversies to property over which the Bankruptcy Court has actual or constructive possession. The test is possession by the bankrupt at the time of the filing of the petition. Magnolia Petroleum Co. v. Thompson, 309 U.S. 478 (1940).

Summary jurisdiction also may be conferred by consent. Harris v. Avery Brundage Co., 305 U.S. 160 (1930), 2 Collier ¶23.08. In the Ninth Circuit, a creditor who files a claim in a bankruptcy estate consents to the jurisdiction of the Bankruptcy Court to adjudicate matters raised by the trustee which arise out of the same transaction as the claim. Peters v. Lines, 275 F.2d 915 (9th Cir. 1960); In re Los Angeles Trust Deed and Mortgage Exchange, 464 F.2d 1136 (9th Cir. 1972).

Cattle Company filed claims in the Properties and Diablo cases for rent due under the Properties and Diablo leases. The purpose of a plenary suit in bankruptcy administration is to seek recovery against one who has not

voluntarily submitted himself to the jurisdiction of the Bankruptcy Court. That purpose is not served by litigating the validity of the leases in a forum other than the Bankruptcy Court subsequent to the filing by Cattle Company of a claim for rent under the lease in the Bankruptcy Court. Peters v. Lines, supra.

RENTAL DUE

The trustee and PG&E paid taxes on the Diablo parcel. Of the total taxes paid, the sum of $425,254.55 is attributable to the Diablo parcel. These taxes were paid since April 30, 1974.

The subrents collected since April 30, 1974 are as follows:

Marre' compilation (Ex. 30)	$205,093.00
Update for years 1979 and 1980 to the time of trial (Ex. JJ)	40,903.00
Amount collected on April 6, 1980 (testimony of Robert B. Marre' on April 8, 1980)	4,366.04
Payment of July 1, 1974 (Ex. 31)	26,600.00
1977 payments from Palm (Morales) (Ex. 31)	11,000.00
Total subrents	$296,962.04

The total credits due by reason of subrents collected since April 30, 1974 and taxes paid on the Diablo parcel since April 30, 1974 is $722,216.59.

The Properties Lease provided for a cost of living index adjustment. The interpretation given to this adjustment by the attorney for the intervenor is correct. Rental due from May 1, 1974 through the first half of 1980 on the Properties lease is $348,745.83. The rental due for a similar period under the Diablo lease is $92,500.00. The total rental due under both leases is $441,245.83.

Deducting the total rental credits of $722,216.59 from the total rents due since May 1, 1974 of $441,245.83 leaves a net rent credit of $280,970.76.

From the testimony there are a number of ways of analyzing the rent due prior to April 30, 1974. The method most favorable to Cattle Company seems to be accurate and appropriate. The rental due Properties is $49,551.03. The rental due Diablo is $55,000.00. The total rental due is $104,551.03.

Under the principals of Pepper v. Litton, 308 U.S. 295 (1939), the claim of Cattle Company to rent due on April 30, 1974 should be subordinated to the claims of other general unsecured creditors. The claims for rental due beginning on May 1, 1974 and thereafter should be allowed and not subordinated. If, hypothetically, the leases had been assumed and assigned shortly after May 1, 1974 the assignee of the leases would owe and presumably would have paid rental to Cattle Company. The close connection relationship among the Cattle Company and the bankrupts would not be relevant to the consideration of disallowance or subordination after April 30, 1974. It would be more persuasive to argue either as to the prefiling or the post-filing rent that Cattle Company, by reason of the confusion in its own records, would be entitled to no claims at all. If there is any error, it occurred in no so concluding.

CONCLUSIONS

The Bankruptcy Court has summary jurisdiction.

The transactions prior to April 30, 1974, smack of bankruptcy preferences and fraudulent transfer. Their avoidance and recovery are matters not before the court. The Properties lease being in effect was convenient, the Diablo lease being terminated was coincidental, the leases being made and broken orally was contrived.

Neither the Properties lease nor the Diablo lease has been amended, modified, or terminated except by the amendments separately to describe parcels L and R and separately to state rents on Lots W and X. The trustee has properly assumed both leases and Cattle Company does not have the right to terminate either lease. The trustee properly may assign the Properties leasehold and the PG&E portion of the Diablo leasehold as contemplated in the settlement approved by the order of October 18, 1977. The amount of rent due has previously been stated.

This Memorandum of Decision shall constitute findings of fact and conclusions of law pursuant

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to Bankruptcy Rule 752. The attorneys for the plaintiff and intervenor should prepare and lodge an appropriate judgment.

DATED: May 12, 1980.

CALVIN K. ASHLAND
Bankruptcy Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In re DIABLO CANYON CORPORATION, a California corporation, Bankrupt.	NO. CV 80-3125-LTL (BK No. 74-5261-CA-"A")
JOHN F. READY, Trustee, Plaintiff, PACIFIC GAS AND ELECTRIC COMPANY, a California corporation, Intervenor, vs. LUIGI MARRE LAND AND CATTLE COMPANY, a California corporation, and KENNETH E. PALM, an individual, Defendants.	M E M O R A N D U M

APPENDIX "C"

This is a bankruptcy appeal by Luigi Marre Land and Cattle Company from judgments entered June 27, 1980 and February 25, 1981 in adversary proceedings held in two related bankruptcy proceedings, San Luis Obispo Bay Properties, Inc. and Diablo Canyon Corporation. The adversary proceedings were consolidated for trial below and most of the issues raised on appeal in the two cases are identical.

None of the appellant's argument on appeal have merit. First, it objects to the admission of certain evidence. However, its only substantial objection to the admission of that evidence under F.R.Evid.801(d)(2), namely, an adequate showing of preliminary facts, was not raised in the court below and therefore may not be asserted on appeal. Second, it objects to the bankruptcy court's refusal to reopen discovery after the intervention of Pacific Gas and Electric. Its contentions that new issues were injected by that intervention and that previous opportunities to obtain information from PG&E were inadequate are frivolous. The bankruptcy court's decision not to reopen

discovery was clearly well within its broad discretion in such matters. Third and fourth, it objects to certain factual and legal determinations concerning the alleged abandonment of the Diablo and Properties leases by the trustee and concerning the cancellation of the Diablo lease by itself. Most of its arguments on these points are without merit; none amount to a showing that the bankruptcy court was clearly erroneous in its findings of fact or erroneous in its conclusions of law. Fifth and finally, it argues that the bankruptcy court failed to do equity in determining that assignment of the leases by the trustee would not give appellant the right to terminate them. However, its two arguments on this point do not reflect an even-handed application of equitable principles. One is a one-sided analysis of the equities based on a mischaracterization of the effect of the judgment below on appellant's rights; the other is an attempt to challenge a four year old, partially consummated settlement agreement which was approved by the bankruptcy court and

by this court and declared by the Ninth Circuit to be effectively beyond legal challenge. Neither is persuasive.

Accordingly, the judgments of the bankruptcy court are affirmed.

Dated this 4th day of February, 1982.

Lawrence T. Lydick
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In re	Appeal No. 82-5224
SAN LUIS OBISPO BAY PROPERTIES, INC., a California corporation,	No. CV 80-3124-LTL
Bankrupt.	(BK No. 74-5260-CA"B")
JOHN F. READY, Trustee,	
Plaintiff,	
PACIFIC GAS AND ELECTRIC COMPANY, a California corporation,	M E M O R A N D U M
Intervenor,	
vs.	
LUIGI MARRE' LAND AND CATTLE COMPANY, a California corporation, and KENNETH E. PALM, an individual,	
Defendants.	

This is a bankruptcy appeal by Luigi Marre' Land and Cattle Company from judgments entered June 27, 1980 and February 25, 1981 in adversary proceedings held in two related bankruptcy proceedings, San Luis Obispo Bay Properties, Inc.

and Diablo Canyon Corporation. The adversary proceedings were consolidated for trial below and most of the issues raised on appeal in the two cases are identical.

None of the appellant's arguments on appeal have merit. First, it objects to the admission of certain evidence. However, its only substantial objection to the admission of that evidence under F.R.Evid.801(d)(2), namely, an adequate showing of preliminary facts, was not raised in the court below and therefore may not be asserted on appeal. Second, it objects to the bankruptcy court's refusal to reopen discovery after the intervention of Pacific Gas and Electric. Its contentions that new issues were injected by that intervention and that previous opportunities to obtain information from PG&E were inadequate are frivolous. The bankruptcy court's decision not to reopen discovery was clearly well within its broad discretion in such matters. Third and fourth, it objects to certain factual and legal determinations concerning the alleged abandonment of the Diablo and Properties leases by the trustee and concerning the

cancellation of the Diablo lease by itself. Most of its arguments on these points are without merit; none amount to a showing that the bankruptcy court was clearly erroneous in its findings of fact or erroneous in its conclusions of law. Fifth and finally, it argues that the bankruptcy court failed to do equity in determining that assignment of the leases by the trustee would not give appellant the right to terminate them. However, its two arguments on this point do not reflect an even-handed application of equitable principles. One is a one-sided analysis of the equities based on a mischaracterization of the effect of the judgment below on appellant's right; the other is an attempt to challenge a four year old, partially consummated settlement agreement which was approved by the bankruptcy court and by this court and declared by the Ninth Circuit to be effectively beyond legal challenge. Neither is persuasive.

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Accordingly, the judgments of the bankruptcy court are affirmed.

Dated this 4th day of February, 1982.

Lawrence T. Lydick
United States District Judge

PROOF OF SERVICE

I, ANTHONY MICHAEL GLASSMAN, am a member of the Bar of the Supreme Court of the United States and am a shareholder in the firm of Glassman & Browning, Incorporated.

I hereby certified that on the 18th day of May, 1983, I served the APPENDICES TO PETITION FOR WRIT OF CERTIROARI as follows:

1. On Pacific Gas & Electric Company, by mailing three copies in a duly addressed envelope, with first-class postage prepaid to Charles T. Van Deusen, Equire and Arthur L. Hillman, Jr., Esquire, 77 Beale Street, 31st Floor, San Francisco, CA 94106.

2. On John F. Ready, Trustee, by mailing three copies in a duly addressed envelope with first-class postage prepaid to David Y. Farmer, Esquire, 1305 Marsh Street, P.O. Box 1214, San Luis Obispo, CA 93406.

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It is further certified that all parties required to be served have been served, and that the list of such parties is as set forth above.

ANTHONY MICHAEL GLASSMAN
GLASSMAN & BROWNING, INC.
360 N. Bedford Drive
Suite 204
Beverly Hills, CA 90210